

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

OPINION AND ORDER

08-cr-87-bbc

Plaintiff,

v.

COREY THOMAS,

Defendant.

Defendant Corey Thomas has filed a motion for modification of sentence under 18 U.S.C. § 3582(c)(2), contending that he was incorrectly classified as a career offender and therefore his criminal conviction and sentence are illegal. Defendant contends that his motion is properly brought under 18 U.S.C. § 3582(c)(2), which allows the court to resentence a defendant whose term of imprisonment was based on a sentencing range that has subsequently been lowered by the Sentencing Commission, “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2).

Defendant’s motion cannot succeed for a number of reasons. The first is that he raised this same issue in a “motion for sentence adjustment” in June 2012. Dkt. #9, 12-cv-269-bbc, and it was denied on the merits in an opinion and order entered on February 15, 2013, dkt. #22, 12-cv-269-bbc. Defendant appealed the order “on all issues accpect [sic],

for illegal sentence,” dkt. #24, 12-cv-269-bbc, and his failure to appeal the order means that he cannot raise the claim again in this court. The unappealed decision is now the law of the case and must stand.

Second, § 3582(c)(2) does not provide defendant a means of challenging his sentence. He is not arguing that his term of imprisonment is based on a sentencing range that has been lowered by the Sentencing Commission, but rather, that the court misapplied the career offender guidelines, which is a different claim.

Third, defendant cannot bring his claim under 28 U.S.C. § 2255 because he has brought at least one proceeding under § 2255 and cannot bring another one unless he obtains prior certification by a panel of the court of appeals that the new motion contains newly discovered evidence or a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” § 2255(h). (And in any event, his claim that the sentencing court erred in calculating his guidelines is not a claim cognizable under § 2255 because defendant’s sentence did not exceed the statutory maximum for the offense. Now that the guidelines are no longer mandatory, a judge must independently determine the appropriate sentence in light of the factors set forth in 18 U.S.C. § 3553(a). The guidelines may influence his decision but they do not bind his discretion to choose a sentence that complies with § 3553(a). Thus, so long as the sentence is below the ceiling imposed by Congress, it does not constitute a miscarriage of justice that can be remedied under § 2255. United States v. Coleman, 763 F.3d 706 (7th Cir. 2014) (“deviations from the Sentencing Guidelines generally are not cognizable on a § 2255 motion”) (quoting Blake v. United

States, 723 F.3d 870, 878-79 (7th Cir. 2013)). See also United States v. Hawkins, 706 F.3d 820, 822 (7th Cir. 2013) (error in classifying petitioner as career offender not cognizable error under § 2255)).

In summary, defendant's motion must be denied.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that defendant Corey Thomas's motion for modification of sentence under 18 U.S.C. §3582 is construed as a post conviction motion under 28 U.S.C. § 2255 and is DISMISSED for lack of jurisdiction. No certificate of appealability shall issue. Defendant may seek a certificate from the court of appeals under Fed. R. App. P. 22.

FURTHER, IT IS ORDERED that if defendant files any additional documents, the clerk is to forward the document to chambers before filing it. If the document raises non-meritorious issues or seeks frivolous forms of relief or is otherwise not a document permitted to be filed under the Federal Rules of Civil or Appellate Procedure at this stage of defendant's case, the document will be placed in the file with no response from the court.

Entered this 29th day of October, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge